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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 383

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I.

NO AUTHORITY EXISTS THAT IT IS ENTIRELY WITHIN THE DISCRETION OF THE TRIAL COURT TO GRANT OR DENY A MOTION FOR MISTRIAL WHEN THE JURY READS OF DEFENDANTS ALLEGED PAST CRIMINAL BACKGROUND AND CONVICTIONS. THE DISTINCTIONS IN THE ANSWER BRIEF ARE NOT VALID.

Respondent takes the firm position that in *Holt v. United States*, 218 U. S. 245, this Court's decision formed a rule to the effect that the above captioned matters were within the trial court's discretion and should not be upset by appellate courts, and that the *Holt* case was dispositive herein, pp. 13 and 14 of the government's brief. A careful reading of the decision of the *Holt* case is necessary in order to determine what the court actually ruled. In the *Holt* case, the pertinent portion of the decision, pp. 250-251, begins with the Court's consideration of one of the appellant's grounds for new trial, precisely, that the trial court had erred in permitting the jury to separate though appellant had failed to except to such separation. Appellant's counsel in support of his ground for new trial, i.e., the separation of the jury, submitted further his affidavit stating that members of the jury had stated to him that they had read newspapers ". . . with articles on the case while the trial was going on." pp. 250-251. The contents or import of the articles is not set forth in the decision. The decision is difficult to follow and therefore pertinent provisions are set forth at length:

> "The court refused to receive counter affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the *public prints* is so obvious, that *for the purpose of passing on the permission to separate* it may be assumed that they did so in this case.
>
> "We are dealing with a motion for a new trial, the denial of which cannot be treated as more than a matter of discretion or as grounds for reversal, except in very plain circumstances indeed (citing cases). It

would be hard to say that this case presented a sufficient exception to the general rule. The judge did not reject the affidavit, *but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion*, it is to be remembered that the statutes or decisions of many States expressly allow the separation of the jury even in capital cases. Other States have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. p. 251." (Emphasis supplied)

From a reading of the above, Petitioner interprets the decision to say that the trial court had discretion to permit a jury to separate, that the trial court did not abuse its discretion in permitting the jury to separate, nor did it abuse its discretion in denying a motion for new trial which motion asserted error in permitting the jury to separate. The *Holt* case is no more authority on the point involved in the instant case than *Mattox v. United States*, 146 U. S. 140. See also *M'Henry v. United States*, 276 F. 761, 764 (C.A.D.C.), as to further deliniation of "public prints", and also *Darcy v. Handy*, 351 U. S. 454, 457, 462.

The position of petitioner as to the *Holt* case is further supported by an analysis of the government's cases pp. 18-19 of its brief. In the thirteen cases cited in support of the government's position that these matters are discretionary with the trial court, ten cases do not cite the *Holt* decision in that connection. Of the remaining three, *United States v. Hirsch, et al.*, 74 F. 2d 215, 218 (C.A. 2), certiorari denied, 295 U. S. 739 cites the *Holt* case to the effect that a motion for withdrawal of a juror is addressed

to the court's discretion: *Bratcher v. United States*, 149 F. 2d 742, 746 cites the *Holt* case for the rule that the court has discretion in denying a motion for new trial, and *Bullock v. United States*, (C.A. 6) decided February 27, 1959, slip op., pp. 16-19 is not available to petitioner.

It is significant in reading through the *Holt* case and the cases cited on pp. 18-19 of the government's brief that none of the cases involved the matter here involved, that is the reading by jurors during the course of trial of the defendant's past criminal activities and convictions except for *Rowley v. United States*, 185 F. 2d 523 (C.A. 8) which case has never been cited for that point. (Comment on the Bullock case is not possible for the reason given above.)

Taking the cases set forth on pp. 18-19, the following is disclosed: *Christensen et al. v. United States*, 16 F. 2d 29, 30 (C.A. 9) no showing that the news item was read; *Reining v. United States*, 167 F. 2d 362, 365 (C.A. 5), certiorari denied, 335 U. S. 830, where the trial court finds "... nothing so inflammatory here so as to convince us that the purity of the trial was destroyed.", *United States v. Pisano*, 193 F. 2d 355, 360-361 involving a "misleading article"; *United States v. Carruthers*, 152 F. 2d 512, 518-519 (C.A. 7), certiorari denied, 327 U. S. 787, rehearing denied, 327 U. S. 817, 819 where the juror who read stated he could remember nothing of the article except as to a motion in court; *Dillon v. United States*, 218 F. 2d 97, 103 (C.A. 8), certiorari dismissed, 350 U. S. 906 where the juror stated what he read did not make sense; *Stunz v. United States*, 27 F. 2d 575, 577 (C.A. 8) which involved a comment on the progress of the trial; *Van Riper v. United States*, 13 F. 2d 961, 967 (C.A. 2), certiorari denied 273 U. S. 702 where the contents are not set forth; *United States v. Hirsch*, 74 F. 2d 215, 218 (C.A. 2), certiorari

denied, 295 U. S. 739 in which sensational matters were published but defense counsel's request to interrogate the jurors was denied and there was no finding the jurors had read; *Bratcher v. United States*, 149 F. 2d 742, 746 (C.A. 4), certiorari denied, 325 U. S. 885 where only newspaper accounts of the trial were involved.

The only strong case cited by the government is *United States v. Postma*, 242 F. 2d 488, 495 (C.A. 2), certiorari denied, 354 U. S. 922.*

Some of the cases to the contrary where the reading of newspaper articles was sufficient for mistrial or new trial because of general defamatory or prejudicial matter being recited are: *Briggs v. United States*, 221 F. 2d 636 (C.A. 6); *Harrison v. United States*, 200 Fed. 662 (C.A. 6); *Griffin v. United States*, 295 Fed. 437 (C.A. 3); *McKibben v. Philadelphia & R. Ry.*, 251 F. 577 (C.A. 3); and see *Welch v. United States*, 135 F. 2d 465, 466-468 (C.A. D.C.). Neither the *Briggs* case, the *Harrison* case, or *Griffin* cases based their ruling on misconduct as the government asserts although misconduct was involved.

The difficulty of attempting to formulate any rules from the above cases cited by the government and then formulating any rule to apply in the instant situation is that the nature of their publications differed so sharply from the matters published in the instant case. It may easily be argued, for various reasons, that where certain inflammatory matter is received, which matter does not fall into a well defined category, that no hard and fast rule can be applied. One reason, impliedly, is that we accept the intrusions of the press into the admittedly imperfect workings of the jury system as a necessary evil.

*Petitioner mistakenly stated certiorari was denied with comment, p. 6 of Petitioner's brief.

although why this is so to a party denied a fair trial is hard to explain. It may be simply that a mistrial should be declared and costs taxed to the offending newspaper after appropriate hearing by the trial court.

Once however intrusions on the jury by newspapers or radio are permitted as necessary evils, and mistrials are not declared as a matter of course in instances of general prejudicial items, it does not follow as a corollary that there cannot be fixed instances in which the publication is considered "ineradicably prejudicial". Admittedly, if it is conceded that general prejudicial intrusions will occur as a necessary evil and mistrial is not declared as a matter of course, discretion as to general defamatory publications should be left with the trial court, cf. the *Briggs* case *supra*, at p. 638 attempting to set forth some rules.

But in this instance there is a clear category already recognized by all courts that past criminal activity and previous convictions are prejudicial and grounds for new trial. This in effect is the rule of the cases cited pp. 10-11 of petitioners opening brief where such publications have with one exception resulted in mistrial or new trial. That such categories of "ineradicably prejudicial" matter are impliedly recognized is seen in the concurring opinion in *Shepherd v. Florida*, 341 U. S. 50, where alleged confessions of defendants were brought to the jurors attention before trial, the confessions never coming into evidence either because of their inadmissible character or other reasons. In the *Shepherd* case if such inadmissible confessions had been introduced, mistrial would have resulted and the same rationalization applies here.

Nothing in the answer brief meets the position maintained by petitioner that the matters manifestly prejudicial *per se* and inadmissible in open court may not be con-

veyed to jurors by newspapers in the jury room or in the home or on the street. Why the rule should be applied when such matter is broached in open court but not in the jury room or out of court is not met by the answer brief of the government, nor is reference made thereto.

Answer is made that the discretion is justified because jurors are capable of disregarding such matters under instructions of court, citing *Weld & Danzig, A Study of the Way in Which a Verdict is Reached by a Jury*, 53 Am. J. Psch. 518, 526 (fn. 4). Reply to that is found in the opening sentence of that article: "Little is known about the manner in which the evidence in a court-trial is received, weighed, and accepted by a jury." p. 518. Moreover, the study involved not actual courtroom and jury-room experiences but three controlled instances wherein three juries in moot court, the jurors being psychology students, listened to a rehearsed mock trial of a civil action. Those facts should indicate that the authority should not have bearing here. There are numerous schools of thought on the jury and its role in this respect, conflicting enough that no general rule can be drawn as to how and to what extent a juror receives and understands evidence and instructions of court. See, Note, Jurors on Trial, 17 Mo. L. Rev. 235-251; The Jury System in America, Bok, Vol. 287, May, 1953, Annals Am. Acad. 97-102; Courts on Trial, Frank, 108-125; Bromley, Free Press v. Free Trial, Vol. 202, March, 1951, Harpers, pp. 91-96 for but a few of the thoughts expressed on this subject.

The comparison the answer brief attempts to draw between *voir dire*, the rule against a juror impeaching his verdict, and the present situation does not hold up. On *voir dire*, the counsel for both sides have much more latitude in their approach in questioning jurors. Questioning of the prospective juror can be more keen and pursued

with greater vigor. Counsel has his peremptory challenges if his challenge for cause is denied. Jurors are not under the same restraint in answering questions as in the situation where a juror already impaneled has received outside impressions contrary to court instructions, see Justice Edgerton dissenting, *Welch v. United States*, 135 F. 2d 465, 467-468 (C.A. D.C.) and cf. the dissenting opinion of Judge Murrah in the instant case R. 64. The dissent in the *Welch* case notes: "I think this was not a case in which silence could safely be interpreted as a denial. If anything, silence implied an admission. The judge's questions could hardly fail to remind the jury that they ought not to have read anything about the trial. 'Have you read the articles?' was roughly equivalent to 'Have you committed the impropriety of reading the articles?' A juror who could honestly exculpate himself by a denial would be likely to do so." See also in this connection, the Briggs case, supra, p. 639. Further reply can be made to the *voir dire* situation in that in the *Shepherd* case the jurors had read of the defendants' confessions before trial and presumably on *voir dire* answered in such manner that on the surface at least their answers were not such as to justify a challenge for cause. The same comparison prevails here. Actually, the situation more comparable to the instant one of the three is the situation where the jury verdict cannot be impeached by a juror for there, as here, the jurors have been finally chosen and the die is cast so to speak.

THE MATTER OF ENTRAPMENT WAS PROPER FOR JURY CONSIDERATION AND HAS BEARING ON THE QUESTION HERE CERTIFIED.

The position of the government in its answer brief is that entrapment was not an issue sufficient to go to the jury, and should not have gone to the jury as it did, and

in effect no harm could have resulted as to such a possible defense as a result of the jury's reading petitioner's alleged criminal background and criminal activity. The position is also taken that in such event Judge Murrah's dissent loses its force, p. 12 of the government's brief. But the dissent does not make the entrapment point its only quarrel with the majority for it sets forth points most ably, such as: "'trial by newspaper' even in the very midst of irresponsible news comment, is neither inevitable nor tolerable," R. 63 and "In sum, it is my view that if the extraneous matter disclosed in the newspaper articles is forbidden, it is ineradicably prejudicial . . . In any event, I would reverse for new trial." R. 65

An issue for the jury's consideration came about as to the creative activity of the government, the playing upon the sympathy of the petitioner by stating long drives at night were involved and the government agent wanted the "stay awake" pills to aid him in driving the evenings in question, the failure of the government to have rebuttal testimony on entrapment — all combined to create an issue as to entrapment for the jury's consideration. *Sherman v. United States*, 356 U. S. 369, 373, 377. R. 8-26, 35-36. The refusal of this Court to grant certiorari on the second point, i.e. that entrapment was established as a matter of law when the government had no rebuttal testimony after the door was opened to entrapment, is not a ruling that there was no issue on entrapment to go to the jury.

The newspaper articles involved herein necessitated mistrial for the reasons stated in the first argument of this reply brief and most certainly necessitated mistrial in light of the entrapment issue given to the jury by the court.

CONCLUSION

It is respectfully submitted that the relief prayed for in petitioner's opening brief be granted.

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No. 383.—October Term, 1958.

Howard R. Marshall, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 15, 1959.]

Per Curiam.

Petitioner was convicted of unlawfully dispensing a number of dextro amphetamine sulfate tablets, a drug within the scope of 21 U. S. C. § 353 (b)(1)(B), without a prescription from a licensed physician, which resulted in misbranding and violation of 21 U. S. C. § 331 (k). The Court of Appeals affirmed, one judge dissenting, 258 F. 2d 94. The case is here on a petition for certiorari, 28 U. S. C. § 1254 (1), which we granted because of doubts whether exposure of some of the jurors to newspaper articles about petitioner was so prejudicial in the setting of the case as to warrant the exercise of our supervisory power to order a new trial. 358 U. S. 892.

Petitioner never took the stand; nor did he offer any evidence. A government agent testified that he was introduced to petitioner as a salesman who had difficulty staying awake on long automobile trips and that on two occasions he obtained these tablets from petitioner. Petitioner asked the trial judge to rule there was entrapment as a matter of law. The judge refused so to hold and submitted the issue of entrapment with appropriate instructions to the jury. Cf. *Masciale* v. *United States*, 356 U. S. 386. The Government asked to be allowed to prove that petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. The trial judge refused this offer saying, "It would be just like offering evidence that he picked

pockets or was a petty thief or something of that sort which would have no bearing on the issue and would tend to raise a collateral issue and I think would be prejudicial to the defendant."

Yet during the trial two newspapers containing such information got before a substantial number of jurors. One news account said:

> "Marshall has a record of two previous felony convictions.
>
> "In 1953, while serving a forgery sentence in the State Penitentiary at McAlister, Okla., Marshall testified before a state legislative committee studying new drug laws for Oklahoma.
>
> "At that time, he told the committee that although he had only a high school education, he practiced medicine with a $25 diploma he received through the mails. He told in detail of the ease in which he wrote and passed prescriptions for dangerous drugs."

The other news account said:

> "The defendant was Howard R. (Tobey) Marshall, once identified before a committee of the Oklahoma Legislature as a man who acted as a physician and prescribed restricted drugs for Hank Williams before the country singer's death in December, 1953.
>
> . . . . .
>
> "Marshall was arrested with his wife, Edith Every Marshall, 56, in June, 1956. She was convicted on the drug charges in Federal District Court here in November and was sentenced to 60 days in jail.
>
> "Records show that Marshall once served a term in the Oklahoma penitentiary for forgery. There is no evidence he is a doctor, court attaches said."

The trial judge on learning that these news accounts had reached the jurors summoned them into his chamber one by one and inquired if they had seen the articles.

Three had read the first of the two we have listed above and one had read both. Three others had scanned the first article and one of those had also seen the second. Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles. The trial judge, stating he felt there was no prejudice to petitioner, denied the motion for mistrial.

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt* v. *United States*, 218 U. S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson* v. *United States*, 335 U. S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures.

In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts (*Bruno* v. *United States*, 308 U. S. 287; *McNabb* v. *United States*, 318 U. S. 332) we think a new trial should be granted.

Reversed.

MR. JUSTICE BLACK dissents.